IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION.
FIRST APPEAL No.498 OF 2006.

Mr.Shirajuddin s/o Abubakar Mohamed.

..Appellant.
[Orig.Plaintiff]

Vs.

Mr.Chhota Shaikh Mohamed
alias Jan Mohammed Ali Hussain.

...Respondent.
[Orig.Defendant]

Shri R.A. Revankar for Appellant.

Kishorem N. Shriyan for Respondent.

CORAM: S.B.DESHMUKH,J.
DATED: 21 /09/2006.

P.C.:-

1] Heard the learned Counsel for the Parties.

2] The Judgment and order passed by the City Civil Court, Mumbai in Notice of Motion No. 128 of 2006 in S.C.Suit No.1914 of 2001 is assailed in the present Appeal.

3] The Appellant was the Plaintiff in S.C.Suit No.1914 of 2001 filed for perpetual injunction against the Respondent/Defendant. In S.C.Suit No. 1914 of 2001, Notice of Motion was taken out on behalf of the present Appellant bearing No. 1479 of 2001. The said

Notice of Motion was heard by the Trial Court and by the order passed on July 15th, 2002, said Motion was made absolute in terms of prayer clause (a), with no order as to costs.

4] In the order passed in Notice of Motion,Trial Court, prima facie, recorded a statement made by Advocate appearing for the Defendant regarding plaintiff's possession, to the extent of half portion of the suit property. The Short Cause Suit No.1914 of 2001, in due course of time, was fixed for hearing. S.C.Suit No. 1914 of 2001 was dismissed in default on 24th November, 2005.On the same day at about 12.00 noon. An Application for Restoration was filed. It was rejected. Therefore, Notice of Motion is taken out for restoration. It is also rejected. Therefore, this Appeal.

5] The Copy of Roznama of S.C.Suit No.1914 of 2001 is filed alongwith the Appeal. It appears that proceedings i.e. S.C. Suit No.1914 of 2001 was commenced from April 3rd, 2001. From this copy of the Roznama, it appears that hearing of the matter was

adjourned for more than one reason. On March 9th, 2005 Board of the Trial Court was discharged. On June, 2005 Board of the Trial Court was adjourned to 21st September,2005. On 21st September,2005 none appeared for the present Appellant before the Trial Court. Absence of the Appellant/Advocate for the Appellant was recorded. The defendant was present, however, his Advocate was absent and said fact is also recorded by the Court. Stage of the Suit on September 21st, 2005 was for recording of the evidence and it was deferred to October 19th, 2005. On October 19th, 2005 neither plaintiff/appellant nor his Advocate was present. Defendant No.1 was present, however, his Advocate was not present. From the Roznama dated 19th October,2005, it appears that issues were framed on September 21st, 2005. However, since none appeared for the Plaintiff on 19th October, 2005, hearing of the Suit was adjourned for recording of the evidence/dismissal on 24th November, 2005. As noted above, none appeared on behalf of the Plaintiff also on 24th November,2005 when the Suit was called out. The Trial Court

dismissed the Suit.

6] It is not disputed on behalf of the Respondent that Notice of Motion No. 128 of 2006 in Short Cause Suit No. 1914 of 2001 was filed on the same day at about 12.00 noon. According to the Appellant, licensee Mr.Prabhu was present in the Court. The Appellant had left for Dubai. It is also undisputed fact that Advocate Mr. Revankar who was engaged by the Appellant/Plaintiff died on 18th February, 2005. It is true that there is no Vakalatnama filed on behalf of the Plaintiff from 17th February, 2005 till dismissal of the Suit on 24th November, 2005.

7] The learned Counsel for the Respondent has referred to para no. 7 of the Judgment of the Trial Court. According to him, after the demise of Advocate Mr.A.G. Revankar, no arrangement for representation of the plaintiff was made and therefore the Notice of Motion came to be rejected.

8] Having considered the facts and circumstances in the present case, lapse on

the part of the Plaintiff/Appellant for two/three dates and non engaging any lawyer to prosecute his suit, cannot be sufficient reason for rejecting the Notice of Motion. The Trial Court ought to have given an opportunity of being heard to the Plaintiff and on allowing of Notice of Motion ought to have decided the Suit on merits.

9] In this view of the matter, the Judgment and order passed by the Trial Court needs to be quashed and set aside. The learned Counsel for the Appellant undertakes to diligently prosecute the Suit, henceforth. The Trial Court has awarded costs of Rs.5,000/- by way of compensatory costs under Section 35(A) of the Code of Civil Procedure. After hearing the learned Counsel for the Parties I have considered the circumstances appearing in this case. Firstly, the Advocate Mr. A.G. Revankar died in the month of February, 2005 is a fact. Licensee Mr. Prabhu was present in the Court on the date of dismissal is a fact. Advocate Mr. R.G.Revankar filed Application Exh.8 for restoration with undertaking of filing of Vakalatnama on the

same day is also a fact. With these admitted facts, imposition of compensatory costs under Section 35(A) of the Code of Civil Procedure is not justified.

10] In the result, Appeal is partly allowed. The Judgment and order passed by the Trial Court in Notice of Motion No. 128 of 2006 in Short Cause Suit No. 1914 of 2001 is quashed and set aside. S.C. Suit No.1914 of 2001 stands restored on the same position on the date of dismissal thereof.

11] Costs of this Appeal is quantified to Rs.2,000/- is awarded to the Respondent. Costs is accordingly paid to the Advocate appearing for the Respondent, who has confirmed receipt thereof.

12] The Parties are directed to appear before the Trial Court on 18th October, 2006. Undertaking of licensee Mr.Prabhu who also happens to be the Power of Attorney Holder of the Appellant/Plaintiff who attend the Trial Court diligently during the Course of hearing of S.C. Suit No. 1914 of 2001 is recorded

that he shall attend the Court diligently during the course of hearing of S.C. Suit No. 1914 of 2001.

[S.B.DESHMUKH,J.]